

C & J ASSOCIATES**PURCHASE ORDER NO. 619-C30025
4015****VABCA-3892 &****VA MEDICAL CENTER
MONTGOMERY, ALABAMA**

Donald M. Jackson, Esq., Montgomery, Alabama, for the Appellant.

William G. Stevens, Esq., Trial Attorney, Office of District Counsel, Montgomery, Alabama and *Phillipa L. Anderson, Esq.*, Acting Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE ANDERS

These appeals arose under a purchase order (PO) in the amount of \$8,040 issued by the Department of Veterans Affairs (VA or Government) on October 1, 1992 to C&J Associates (Appellant or C&J) for pest control services for the period October 1, 1992 through September 30, 1993 at the VA Medical Center, Montgomery, Alabama (VAMC).

VABCA No. 3892 is an appeal from a final decision of the Contracting Officer (CO) dated August 17, 1993 on a claim in the amount of \$3,831.75 for costs Appellant asserts it incurred as a result of a termination for the convenience of the Government.

VABCA No. 4015 is an appeal from a final decision of the CO dated April 1, 1994 denying, in part, a breach of contract claim by C&J in the amount of \$20,185.

The record consists of the CO's Rule 4 Appeal File, as supplemented by Appellant, the pleadings, a one volume transcript of hearing, and the Government's posthearing brief. Appellant, although given several opportunities to do so, filed no briefs.

FINDINGS OF FACT**THE CONTRACT**

On August 11, 1992, the VA sent a Request for Quotations (RFQ)(SF 18; Rev 10-83) to three pest-control contractors. The RFQ requested proposals for furnishing all equipment, supplies, labor and supervision to provide pest control services at the VAMC for the period October 1, 1992 through September 30, 1993. C&J submitted the lowest quotation, in the amount of \$8,040.00, dated August 31, 1992. On October 1, 1992, the VA issued PO No. 619-C30025 to C&J.

The PO contained neither a termination for default nor a termination for the convenience of the Government clause, nor were either incorporated by reference.

Specifications attached to the PO described the "TASKS" required of the Contractor as follows:

- a. Inspection to determine which pest management measures

are appropriate and required.

- b. Recommending environmental sanitation practices that restrict or eliminate food, water or harborage for pests.
- c. Selection and utilization of non-chemical control methods which eliminate, exclude or repel pests (i.e., insect electrocution devices, traps, caulking, air screens, etc.).
- d. Selection and use of the most environmentally sound pesticide(s) to effect control when chemical control methods are necessary.
- e. Control of general structural anthropoid pests (i.e., cockroaches, ants, carpet beetles, spiders, carpenter ants, carpenter bees, etc.).
- f. Control of flying insect pests (i.e., house fly, stable fly, blow flies, etc.).
- g. Control of predatory pests (i.e., lice, bedbugs, fleas, mites, ticks, bees, wasps, mosquitoes, scorpions, etc.).
- h. Control of stored product pests (i.e., sawtooth grain beetle, red/confused flour beetles, trogoderma beetles, grain moths, etc.).
- i. Control of mice and rats (i.e., house mouse, field mouse, roof rat, Norway rat, etc.).
- j. Control of pest birds (i.e., pigeons, sparrows, blackbirds, etc.).
- k. Control of other vertebrate pests (i.e., dogs, cats, bats, squirrels, gophers, moles, skunks, snakes, rabbits, etc.).
- l. Control of lawn and turf pests (i.e., sod webworms, Japanese beetle larvae, armyworms, cutworms, wireworms, cinch bugs, crickets, ants, wasps, etc.).
- m. Control of shade tree and ornamental pests (i.e., aphids, scales, mealbugs, mites, weevils, leaf miners, caterpillars, borers, sawflies, chafers, bacterial diseases, fungi, etc.).
- n. Control of aquatic pests (i.e., mosquito larvae/pupae, algae, etc.).
- o. Evaluation of control measures through follow-up inspections.

(R4, tab 2)

The following special provision is particularly pertinent to this Appeal:

14. *RESIDUAL TREATMENT:*

During regularly scheduled visits the contractor shall apply a residual treatment for the control of roaches, using the crack and crevice method only, at least once every month in kitchens, dining rooms, etc. Approved residual pesticides will be used in other areas as required. Pesticides will not alter the appearance of walls, floors, bases or other areas.

15. *FOGGING TREATMENT:*

At the aforementioned time, the contractor shall apply an EPA approved nonresidual pesticide to the Dietetic Kitchen and Canteen food preparation areas using an Actisol VLV Unit or equivalent.

Each hospital building was listed with a schedule for treatment of specific areas at specific times. Provision for emergency response was also included.

VABCA No. 3892

As early as November 2, 1992, the CO began receiving complaints about Appellant's performance, including allegations that C&J was failing to perform scheduled inspections, failing to respond to call-in requests, and failing to provide documents required by the PO. In March of 1993, the CO was informed by the VA Chief, Environmental Management Service, that C&J was deficient in its hours of operation, response to emergency calls, providing scheduled service, failure to provide fogging treatment ("bomb") in the kitchen and canteen areas, failure to provide a list of pesticides used or planned to be used, failure to treat trees and shrubs, and failure to comply with certain reporting requirements. (R4, tabs 6, 10)

On March 24, 1993 the CO sent C&J a notice stating that it was allowed twenty days from receipt of the notice to correct the deficiencies or have its contract canceled. (R4, tab 11) Complaints continued to come in to the CO about C&J's performance. Appellant wrote to the CO on April 1, 1993 in an attempt to explain the problems, and, on April 2, 1993, a meeting was held between C&J and VA contracting officials to discuss the problems. The notes of that meeting do not reveal that the problems were resolved. The CO's memorandum of that meeting stated, "these are recurring problems that must be settled and we must see an improvement quickly or we will be forced to [cancel] the purchase order." (R4, tabs 11-14)

Appellant continued to refuse to bomb the kitchen, as required by the PO. The VA checked with appropriate environmental agencies to determine if there was any reason not to use a fogging bomb in the kitchen area, since Appellant had asserted that it was not wise to do so. Responses from both state and federal agencies indicated that there were no restrictions against fogging except to use common precautions. (R4, tab 15)

On April 13, 1993, the VA Chief, Dietetic Service, informed the CO that immediate

action was necessary to control roaches in the kitchen; that the Appellant had been told numerous times that his spraying was ineffective; and, that the Contractor refused to bomb the kitchen. (R4, tab 17) The CO and the Assistant Chief, Environmental Management Service, visited the kitchen on that same day and observed "a large amount of roaches crawling around the kitchen tables." (R4, tab 18) Without further contact with C&J, the CO terminated the PO on April 13, 1993 by a letter (not designated as a "final decision"), stating:

We have made several attempts to allow you to correct performance deficiencies under purchase order 619-C30025. However, we continue to receive complaints from Mr. Charlie Chandley, the Chief of Environmental Management Services regarding your performance. Therefore, you are hereby notified that purchase order 619-C30025 is terminated, effective April 13, 1993. You will be reimbursed for all services rendered up to and including the effective date of termination.

(R4, tab 19)

On May 1, 1993 Appellant sent an Invoice in the amount of \$335.00 for "Pest Control Services & Supplies for the period 04/01/93 through 04/13/93."(R4, tab 20)

On May 12, 1993, C&J wrote the Director of the VA Medical Center asking that he "waive this improper termination of contract." C&J asserted that it had been in full compliance with the specifications and regulations and had not been afforded a sufficient opportunity to cure the problems detailed in the VA's cure letter dated March 24, 1993. (R4, tab 22)

On May 19, 1993, the CO responded to C&J's May 12 letter. In that letter, the CO stated that the PO was terminated "due to your failure to comply with the terms of the Purchase Order," listing the following:

Specifically, among other reasons you failed to:

- a. Treat outside shrubs, trees and Lawn as required. (Section 5-L, M)
- b. Provide Fogging Treatments in Dietetic Kitchen and Canteen Food preparation areas. (Section 15)
- c. Get approval to work outside regular working hours as stated in the Purchase Order. (Section 2-B, and 10)
- d. General Performance of the Purchase Order has been unsatisfactory.

The CO further explained the termination as follows:

Furthermore on April 13, 1993, a large number of adult roaches were found in the Dietetic Kitchen. This was an intolerable condition and further evidence of your continued failure to comply with all of the terms of said Purchase Order. For health, safety and welfare purposes as well as the above stated failures, the Purchase Order was terminated so that another exterminator could perform essential extermination functions. No indications had been received from you that you intended to comply with the Purchase Order within the time period.

As stated, due to the necessity of providing clean sanitary conditions, for the preparation of meals for our veterans, it was determined another exterminator's services were immediately required.

[Nonperformance] of scheduled inspection and pest maintenance in certain areas of the Purchase Order were reported to me on several occasions. These areas included, Storage Processing and Distribution, Operating Room and the Canteen, which are locked after 4:30 p.m. and only authorized personnel can allow entrance. The O[perating]R[oom] supervisor has stated that Mr. Duncan has never been in the OR rooms. As you are aware, Mr. Duncan did not report to perform work until after 3:30 p.m., which would have required consent to gain entry into these areas (SPD, OR, and Canteen). This nonperformance also supported my decision to terminate the Purchase Order due to your failure to comply with all of its terms.

(R4, tab 24)

On June 25, 1993, the CO and other VA officials met with representatives of C&J to discuss the termination. In C&J's letter to the Medical Center Director requesting reinstatement of the PO, it had asserted that it was not afforded a sufficient opportunity to cure, i.e., that it was terminated prior to the expiration of the 20 days allowed in the cure notice. The cure notice was discussed at the June 25 meeting. Appellant was asked what it had planned to do in the remaining time left in the 20-day cure period. The response was that it was in full compliance with all of the items of the contract and that there was nothing to correct or nothing else to do. (R4, tab 26; Tr. 117, 178, 208, 235)

On June 29, 1993, the CO and other VA officials again met with representatives of C&J in an attempt to reach a settlement. C&J presented a list of what it wanted, including terminating the contract for convenience in lieu of default, payment for the remaining period of the contract (from April 15, 1993 to September 30, 1993), and reimbursement for attorney fees and legal research, for a total of \$4,622.60. The matter was not resolved at that meeting. (R4, tab 27)

On July 1, 1993, C&J submitted a revised proposal for settlement of the matter,

including three "choices." (1) "CHOICE 1" was for a total of \$4,622.60, including \$3,685.00 for "payment start from date of termination up through expiration of contract;" \$100 for attorney fees; \$837.60 for legal research ("10 hrs. @ 2 people @ \$41.88 hr"); "A letter to C&J stating that all letters and negative material will be taken from C&J's files at the VA;" and agreement that "Any reference as to the termination of this contract will be addressed as a termination for convenience." (2) "CHOICE 2" was for a total of \$2,612.60, including reinstatement of the contract; a letter to C&J stating that all letters and negative material will be taken from C&J's files at the VA; "back pay (for April, May, and June, 1993) in the amount of \$1,675.00; attorney fees in the amount of \$100.00; legal research ("10 hrs @ 2 people @ \$41.88 hr) in the amount of \$837.60. or (3) "CHOICE 3," forwarding an appeal of the termination to this Board. (R4, tab 28)

C&J filed an appeal from the VA's default termination on July 10, 1993, docketed as VABCA No. 3858. On July 20, 1993, the CO issued a final decision denying reinstatement of the purchase order and listing the reasons for the default termination. (R4, tabs 29, 31, 32) On July 24, 1993, the CO, by a final decision, withdrew the termination for default, stating the following:

Please be advised that VA is withdrawing the final decision, and pursuant to Federal Acquisition Regulation 49.109-4 and 49.603-6, is converting the default termination to a no-cost termination for the convenience of the Government. The no-cost termination is effective April 13, 1993. The VA is pursuing a no-cost termination because it is the VA's position that: a. C&J Associates has been paid in full for all work performed under the contract prior to April 13, 1993; b. C&J Associates did not perform any work on the contract after April 13, 1993; and c. C&J Associates has not incurred any costs for the terminated portion of the contract work.

If you disagree with the VA's position that C&J Associates is not entitled to any further funds in connection with this no-cost termination for convenience, you may submit a termination settlement claim for further consideration by the undersigned.

(R4, tab 33)

On July 29, 1993, the Board dismissed C&J's appeal from the default termination (VABCA No. 3858) as moot, based on the CO's conversion of the default termination to a termination for the convenience of the Government. (R4, tab 34)

On August 13, 1993, C&J submitted a "TERMINATION CLAIM" in the amount of \$3,831.75:

PROFIT & OVERHEAD OFFERED BY GOVERNMENT

\$3,685.00 @ 10%=

\$368.50

\$3,685.00 - \$368.50 = \$3,316.50	
<u>X 10%</u>	
	<u>\$331.65</u>
	\$700.15

OTHER COSTS INCURRED BY C&J

ATTORNEY FEES	\$200.00
LEGAL RESEARCH, COMPOSING APPEAL LETTERS, MEETINGS WITH CONTRACTING OFFICER, 35 HOURS @ 41.88 HR. @ 2 PEOPLE	\$2,931.60
TOTAL CLAIM	\$3,831.75

(R4, tab 35)

The CO issued a final decision on C&J's termination for convenience claim on August 17, 1993, stating, in part:

I have considered your claim. As you know C & J Associates was paid by the Department of Veterans Affairs (VA) up through the date of termination on April 13, 1993. This included profit and overhead. As anticipatory profits and overhead costs are not allowable, your claim of \$700.15 is disallowed. Since the claim is uncomplicated, and legal research by lay employees of C & J Associates, cost of appeal letters, and meetings with the Contracting Officer would not come within the definition of FAR 31.205-42(g), the amount of \$2,931.60 is disallowed. The attorney fees in the amount of \$200 are allowed. Thus the VA may pay as the total amount of your termination settlement claim the amount of \$200.00.

(R4, tab 36)

C&J's appeal from that decision was docketed as VABCA No. 3892. (R4, tab 38)

VABCA No. 4015

On March 3, 1994, Appellant presented the following "breach of contract" claim in the amount of \$20,185 to the Contracting Officer:

Your terminating contract #619-C30025 before the 20-day